Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *G. P. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 107

Tribunal File Number: GE-15-4315

BETWEEN:

G. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Canadian Custom Packaging Co.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Alcide Boudreault

HEARD ON: July 21, 2016

DATE OF DECISION: August 16, 2016

Canada

REASONS AND DECISION

ATTENDANCE AND FORM OF HEARING

[1] The Social Security Tribunal (the "Tribunal") held a hearing by teleconference for the reasons stated in the notice of hearing dated June 7, 2016, specifically, the information in the file and the need for additional information. This method is best suited to the parties' accommodation needs. It also meets the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[2] The Appellant, Mme G. P., was accompanied at the hearing on July 21, 2016 by S. M. of the *Mouvement chômeurs et chômeuses de l'Estrie*.

[3] Mr. A. N., the employer's representative, was present at the hearing.

[4] The Employment Insurance Commission (the Commission) did not appear.

DECISION

[5] The Tribunal determined that an indefinite disqualification was justified under sections 29 and 30 of the Employment Insurance Act (the "Act") because the Appellant voluntarily left her employment without just cause. The appeal is dismissed.

INTRODUCTION – STATEMENT OF FACTS AND PROCEEDINGS

[6] The Appellant worked for the Canadian Custom Packaging Company from May 29, 2015 to October 2, 2015, on which date she voluntarily left her employment (GD3-29).

[7] On November 25, 2014, the Appellant submitted a renewal claim for initial benefits starting November 2, 2014 (GD3-3 to GD3-12).

[8] On October 28, 2015, in its notice of decision, the Commission informed the Appellant that she was not entitled to renewal benefits because she had voluntarily left her employment on October 2, 2015 without just cause within the meaning of the Act. In the Commission's opinion,

this was not the only reasonable alternative in her case. The Appellant was not entitled to benefits starting on January 18, 2015 (GD3-29 to GD3-30).

[9] On November 6, 2015, the Appellant filed a request for reconsideration of the Commission's decision (GD3-31 to GD3-38).

[10] On December 1, 2015, in its notice of decision following an administrative review, the Commission informed the Appellant that it had not varied its decision concerning the dispute (GD3- 47 to GD3-47).

[11] On December 23, 2015, the Appellant filed an appeal with the Tribunal.

ISSUE

[12] The Tribunal must reach a determination concerning the indefinite disqualification imposed on the Appellant under sections 29 and 30 of the Act because she voluntarily left her employment without just cause.

THE LAW

[13] Section 29 of the Act:

For the purposes of sections 30 to 33,

a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period; (…)

b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment

ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the Canadian Human Rights Act,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.

[14] Subsection 30(1) of the Act:

A claimant is disqualified from benefit if the claimant voluntarily leaves an employment without just cause, unless:
a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[15] Subsection 30(2) of the Act:

The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

[16] Subsection 30(3) of the Act:

If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

[17] Section 51.1 of the Regulations:

For the purposes of subparagraph 29(c)(xiv) of the Act, other reasonable circumstances include

(a) circumstances in which a claimant has an obligation to accompany to another residence a person with whom the claimant has been cohabiting in a conjugal relationship for a period of less than one year and where

(i) the claimant or that person has had a child during that period or has adopted a child during that period,

(ii) the claimant or that person is expecting the birth of a child, or

(iii) a child has been placed with the claimant or that person during that period for the purpose of adoption; and

(b) circumstances in which a claimant has an obligation to care for a member of their immediate family within the meaning of subsection 55(2).

[18] When a decision by the Commission is brought on appeal, the decision is no longer under the authority of the said Commission, and any amendment of a decision once an appeal had been launched is invalid. Canada (AG) v. Wakelin, A-748-98; Canada (AG) v. Poulin, A-516-91; and Canada (AG) v. Von Findenigg, A-737-82

[19] *It lies with the Commission to prove that the leaving was voluntary. Once that point has been established, the onus is on the claimant to show that he left his employment with just cause. (Patel, 2010 FCA 95; Tanguay, A-1458-84)*

[20] *"To determine whether just cause for leaving an employment exists, it must be asked whether, on a balance of probabilities, the claimant had no reasonable alternative to leaving"* ***(White, 2011 FCA 190)***

[21] *"The question is not whether it was reasonable for the claimant to leave the employment, but rather whether leaving the employment was the only reasonable course of action open to the claimant, having regard to all the circumstances." Laughland (2003 FCA 129)*

[22] *The decision-maker must determine whether the claimant "had no reasonable alternative to leaving."* ***Astronomo (A-141-97).***

[23] It is generally reasonable to continue working until new employment is found rather than decide unilaterally to leave one's employment. ***(Graham (2011 FCA 311)***

EVIDENCE

In the file

[24] The Appellant voluntarily left her employment because she was unable to work Saturdays (GD3-20).

[25] The Appellant obtained a court decision giving her custody of her children on weekends and she did not want to jeopardize her visitation rights by working overtime on Saturdays (GD3-27).

[26] The employer was familiar with the Appellant's family situation and knew that she could not work Saturdays. He did not oblige the Appellant to work overtime (GD3- 20).

[27] The employer had asked employees to work overtime on certain Saturdays on a voluntary basis, but no one was obliged to accept. Overtime is rarely necessary GD3-22).

[28] According to the Appellant, her supervisor insisted that it was absolutely necessary for her to work overtime on Saturdays, otherwise she would receive warnings and might be dismissed (GD3-27).

[29] The Appellant never worked on Saturday, and if there had been a problem, she could have spoken to the Director, Mr. A. N.

[30] The employer said that the employee was competent, effective and held a product design position (GD3-43).

[31] The employer confirmed that the atmosphere at work was difficult, and that the Appellant has been seen twice shortly before she left.

[32] The supervisor was not on the verge of dismissing the Appellant. A written warning was planned concerning her attendance and respect co-workers, but was not delivered to her because she left first. GD3-45

[33] The Appellant did not explore the possibility of moving to another department. She had looked for work before leaving, but was unsuccessful.

[34] On the day she resigned, the Appellant apparently tried to contact Mr. A. N. but he did not answer. The employer said that the Appellant had never contacted him to discuss her dissatisfaction. He never received a voicemail from her. She left only one message with his assistant, Nicole, on the day she resigned (GD3-44).

At the hearing

[35] The employer stated that overtime was never mandatory, and when it was available, it was scheduled from Monday to Friday, and on weeknights. The overtime requested for was a one-month period, but was never imposed.

[36] Mr. A. N., the employer, explained that during peak periods, employees were asked to make an effort to work overtime. He had asked the Appellant too help the team, but she did not cooperate.

[37] The employer thinks the matter was a huge misunderstanding, and the Appellant never came to see him, which he regrets because they could have found solutions.

[38] The Appellant had a strong personality and was sometimes prone to certain shortcomings, but an arrangement could have been made. He said that the Appellant was an effective employee.

[39] The employer did was unable to meet the Appellant because she left too soon and without warning.

[40] The Appellant said again that her supervisor demanded that she work overtime and said she might be dismissed. She resigned by leaving Mr. A. N. a voice message.

[41] The Appellant's representative, Ms. S. M. gave her appraisal of the situation, citing certain passages from the Act. She referenced paragraph 29 c)(v) "*obligation to care for a child or a member of the immediate family"* and paragraph 29 c) (ix) *"significant changes in work duties."* She also believes that the Appellant should be given the benefit of the doubt.

[42] Ms. S. M. mentioned that the Appellant's attending physician issued her a medical certificate on December 9, 2015 confirming that she was in a residential treatment program and was unable to work starting October 21, 2015.

[43] The employer asked the Appellant why she did not come to see him to discuss the problem she was having with Ms. C. H. in order to reach an arrangement. She answered that she

had tried to contact him several times but was unsuccessful, and that she had nothing else to add.

PARTIES' ARGUMENTS

[44] The Appellant made the following arguments:

a) She challenges the Commission's decision;

b) The physician confirmed that she had to leave her employment on October 2, 2015 due to an illness;

c) She had to start treatment on October 21, 2015 for alcoholism, and she remains in treatment now;

d) She spoke to the officer about her substance problem, but the officer based her decision exclusively on her refusal to work Saturdays, without making allowance for her illness;

e) She provided a medical certificate, dated December 9, 2015, which confirms that she is enrolled in a rehabilitation program for her alcoholism problem;

f) She has not been fit to work since October 2, 2015.

[45] The employer argued that:

a) The situation is a major misunderstanding;

b) He would have liked to meet with the Appellant to find a solution;

c) Overtime is not a common occurrence and it has never been mandatory;

d) The Appellant was an effective employee despite a few shortcomings at work.

[46] The Respondent made the following arguments:

a) Subsection 30(2) of the Act provides for disqualification when a claimant voluntarily leaves an employment without just cause. The legal test is whether the Appellant had no reasonable alternative to leaving the employment;

b) Obviously, the claimant could not work on Saturdays because of the family obligations stipulated in the Superior Court order. However, nothing on file shows that Saturday overtime was mandatory;

c) The claimant confirms that she never worked on Saturday. She did not prove that her situation was urgent or intolerable to the point that she had to leave immediately. She could have waited to meet with the director and discuss the situation. She could also have made sure she had another job before quitting;

e) The claimant also mentioned the fact that she did not like the atmosphere, and that one of her coworkers was constantly criticizing her. The fact that there was friction, a degree of animosity or a conflict situation certainly did little to improve the atmosphere at work, but it does not give a person just cause to leave an employment;

f) The claimant did not show that the situation was so intolerable that she had to leave without using the other reasonable alternatives available to her. The claimant mentioned the fact that she had received a verbal warning when she refused to work Saturdays, and that her superior had told her she would be suspended and then dismissed. This approach, leaving to avoid possible dismissal, does not constitute just cause within the meaning of the Act;

g) In her request to the Tribunal, the claimant alleges that the Commission's officer did not take account of her substance problem in reaching a decision. She said that the physician confirmed, in her medical certificate that she had to leave work effective October 2, 2015 because she was ill. All of the medical certificates that the claimant provided (GD3-19, GD3-53 and GD2-4) mention an inability to work, but do not say that the claimant had to leave her employment or, on handing in her resignation, that the claimant was in such a state of confusion that she did not realize the scope of her decision;

h) In this case, the Commission determined that the claimant did not have just cause to leave her employment on October 2, 2015 because she had not exhausted all reasonable solutions first;

i) Considering all of the evidence, a reasonable alternative would have been for the Appellant to discuss the situation with the director, request a transfer, ensure she found another job before leaving, or take sick leave;

(j) The claimant failed to show just cause under the Act for leaving her employment. The case law supports the Commission's decision.

ANALYSIS

[47] Under section 29 of the Act, a claimant has just cause for voluntarily leaving an employment if the claimant had no reasonable alternative to leaving, having regard to all the circumstances.

[48] Subsection 30(1) of the Act provides that a claimant is disqualified from receiving any benefits if the claimant left an employment without just cause.

[49] When a decision by the Commission is brought on appeal, the decision is no longer under the authority of the said Commission, and any amendment of a decision once an appeal had been launched is invalid. ***Wakelin, A-748-98; Poulin, A-516-91; Von Findenigg, A-737-82***

[50] It lies with the Commission to prove that the leaving was voluntary. Once that point has been established, the onus is on the claimant to show that he left his employment with just cause. » ***(Patel 2010 FCA 95; (Tanguay A-1458-84)***

[51] The decision-maker must determine whether the claimant “had no reasonable alternative to leaving.” ***Astronomo (A-141-97).***

[52] “The question is not whether it was reasonable for the claimant to leave the employment, but rather whether leaving the employment was the only reasonable course of action open to the claimant, having regard to all the circumstances.” ***(Laughland 2003 FCA 129)***

[53] Before abandoning her employment, it is vitally important to consider the consequences. The case law is constant on this matter. Herein, the Appellant obviously left her employment voluntarily, by personal choice. She did not show that she had made a constant effort to resolve the situation with her employer. Simply leaving the employer a voice mail is not enough. At the hearing, the employer confirmed that he had been unable to speak with the Appellant because she had left.

[54] "In most cases, claimants have an obligation to attempt to resolve workplace conflicts with an employer or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job" ***(White 2011 FCA 190); (Murugaiah 2008 FCA 10); (Hernandez 2007 FCA 320); (Campeau 2006 FCA 376)***

[55] One reasonable solution would have been to discuss the situation with her employer to see if the supervisor's claims reflected the employer's instructions. Ample case law establishes that even if an employee is dissatisfied with the nature of his or her work or working conditions, he or she does not have just cause to hastily leave an employment before finding another, unless the conditions are unbearable to the point that remaining is impossible.

[56] In Graham (2011 FCA 311), we read that it is generally reasonable to continue working until new employment is found rather than decide unilaterally to leave one's employment.

[57] The Appellant left her employment immediately. On receiving no reply from her employer, a reasonable solution would have been to insist on meeting her employer in his office and to continue working.

[58] "The question is not whether it was reasonable for the claimant to leave the employment, but rather whether leaving the employment was the only reasonable course of action open to the claimant, having regard to all the circumstances." Laughland (2003 FCA 129)

[59] The Federal Court of Appeal (White, 2011 FCA 190) explained that, ""To determine whether just cause for leaving an employment exists, it must be asked whether, on a balance of probabilities, the claimant had no reasonable alternative to leaving ...."

[60] ***Bois (A-31-00)*** is part of the consistent case law explaining that the term "just cause" is not defined in the Act. However, the term "good reason" is not a synonym for "just cause." Although a claimant may have good reason to leave an employment, such reason does not necessarily constitute just cause within the meaning of the Act.

[61] The case law establishes that in cases of voluntary departure, the Appellant must have just cause to leave her employment and must show that it was the only reasonable alternative in her case. Leaving an employment immediately may seem valid, but according to the case law, it does not constitute just cause. Moreover, voluntary departure was not the only solution having regard to all of the circumstances since the employer showed his willingness to meet with the Appellant and find solution other than leaving the company.

[62] The Appellant's representative cited paragraph 29 c) (ix) *"significant changes in work duties."* She contended that asking the Appellant to work on weekends was a significant change in working conditions.

[63] An employee is entitled to expect the employer to uphold the terms of an employment contract, and not to unilaterally introduce major changes to her duties. The Act does not require that a situation be urgent before the employment relationship ends, but the change must be significant, and having regard to the circumstances, departure must represent the only reasonable alternative.

[64] The aim is to determine whether changes made to duties lead to abuses or an undue deviation from condition at the time of hiring. A claimant is justified to leave an employment if the employer unilaterally imposes significant changes to duties, causing a substantial change in the nature of the duties to be performed.

[65] A change that is not abusive does not justify voluntary departure. A reasonable solution before leaving would have been to take the necessary steps to meet with Mr. A. N., who is the decision making authority in labour relations matters within the company. The Tribunal does not believe that the Appellant had been placed in an abusive or unreasonable situation that would justify her voluntary departure.

[66] The Appellant's representative also cited paragraph 29c)(v), "*obligation to care for a child or a member of the immediate family.*" Caring for a child means caring for a child every day of its life, even when the responsibility is shared with a former spouse. A person's responsibilities in this regard may be difficult to balance at times with job requirements. In this case, the Appellant was not required to care for her child constantly, every day, to a degree that would prevent her from working. The representative's argument is not consistent with the spirit of paragraph 29 c) (v).

[67] It is important not to confuse necessity with the mere desire to care for a young child, reflecting a voluntary personal choice by the insured person. A person who voluntarily leaves an employment by personal choice to care for a child and who asks for regular benefits would not easily meet the condition provided by the Act to justify such departure.

[68] The representative mentioned the benefit of the doubt. The Tribunal does not support this assumption. Such a notion implies that the evidence submitted is equal, and that the decision-maker cannot settle the matter. The Tribunal considers the evidence clear. The Appellant did not weigh all of the circumstances before deciding that her departure was the only reasonable solution in her case.

[69] Ms. S. M. recalled that a medical certificate was issued on December 9, 2015 by the Appellant's attending physician, confirming that she was in a residential treatment program and could not work as of October 21, 2015. Exhibit GD3-21 shows that the Commission took this fact into account. The Tribunal does not believe this evidence has any effect on the current case because the Appellant voluntarily left her employment for personal reasons.

CONCLUSION

[70] The Tribunal relies on ***Patel, 2010 FCA 9***, which established that the onus is on the claimant to show that he left his employment with just cause. The Tribunal is of the opinion that the reason the Appellant gave for leaving her employment, i.e. to care for a child or a member of the immediate family, as provided for in subparagraph 29(c)(v), was not legitimate, and she did not prove that she had just cause to leave her employment.

[71] In the Tribunal's opinion, the Appellant did not prove that leaving her employment was the only "reasonable alternative" in her case. The appeal is dismissed.

DATE OF REASONS: August 16, 2016.

Alcide Boudreault,
Membre
General Division
Employment Insurance